

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MICHELE ERKAN, on behalf of herself, )  
her minor child, and all others )  
similarly situated, )

Plaintiff, ) Civil Action  
vs. ) No. 12-12052-FDS  
)

NEW ENGLAND COMPOUNDING )  
PHARMACY, INC., d/b/a NEW ENGLAND )  
COMPOUNDING CENTER, et al., )  
Defendants. )

IN RE: NEW ENGLAND COMPOUNDING )  
PHARMACY, INC. PRODUCTS ) Civil Action  
LIABILITY LITIGATION ) No. 13-02419-FDS  
)

STATUS CONFERENCE

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

John Joseph Moakley United States Courthouse  
Courtroom No. 2  
One Courthouse Way  
Boston, MA 02210

March 12, 2013  
3:00 p.m.

Valerie A. O'Hara, FCRR, RPR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way, Room 3204  
Boston, MA 02210  
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiffs:

3 Hagens, Berman, Sobol, Shapiro LLP, by THOMAS M.  
4 SOBOL, ESQ. and KRISTEN JOHNSON PARKER, ATTORNEY,  
55 Cambridge Parkway, Suite 301, Cambridge, Massachusetts  
02142;

5 Ellis & Rapacki LLP, by FREDRIC L. ELLIS, ESQ., 85  
6 Merrimac Street, Suite 500, Boston, Massachusetts 02114;

7 Robinson & Cole, LLP, KIMBERLY A. DOUGHERTY,  
8 ATTORNEY, One Boston Place, Suite 2500, Boston,  
Massachusetts 02108;

9 Andrews Thornton, by ANNE ANDREWS, ATTORNEY, ESQ.,  
10 2 Corporate Park, Suite 110, Irvine, California 92606;

11 Brown Rudnick, by DAVID J. MOLTON, ESQ., Seven Times  
Square, New York, New York 10036;

12 For the Defendants:

13 Harris Beach PLLC, by FREDERICK H. FERN, ESQ.,  
14 100 Wall Street, New York, New York 10005;

15 Hinshaw & Culbertson LLP, by DANIEL E. TRANEN, ESQ.,  
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16 Tucker & Ellis LLP, by MATTHEW P. MORIARTY, ESQ.,  
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18 Donoghue, Barrett & Singal, P.C., by MICHELLE R.  
19 PEIRCE, ATTORNEY, ESQ., One Beacon Street, Boston,  
Massachusetts 02108-3106;

20 Michaels, Ward & Rabinovitz LLP, by DAN RABINOVITZ, ESQ.,  
21 One Beacon Street, Boston, Massachusetts 02108;

22 Todd & Weld LLP, by HEIDI A. NADEL, ESQ.,  
28 State Street, 31st Floor, Boston, Massachusetts 02109;

23 Duane Morris LLP by MICHAEL R. GOTTFRIED,  
24 ESQ., 100 High Street, Suite 2400, Boston, Massachusetts  
02110-1724;

25 Lawson & Weitzen, LLP, by RYAN A. CIPORKIN, ESQ.,  
88 Black Falcon Avenue, Boston, Massachusetts 02210;

1 APPEARANCES (CONTINUED):  
2 ALSO PRESENT:

3 Michael Corey, Esq.  
4 Michael D. Galligan, Esq.  
5 Joseph Thomas, Esq.  
6 Charles Kaplan, Esq.

7 VIA PHONE FOR The PLAINTIFFS:

8 Colin Jones  
9 Bill Leader  
10 Phil Bean  
11 Steven Resnick  
12 Mary Gidaro  
13 J. Stephen King  
14 Mark Dancer  
15 Daniel Myers  
16 Frank Federico  
17 Chris Cain  
18 Melvin Wright  
19 Robert Jenner  
20 Patrick Fennell  
21 Harry Roth  
22 Patrick Carter  
23 Ed Jazlowiecki  
24 Marc Lipton  
25 Alyson Oliver  
Will Riley  
Robert Sickels  
Marnie McGoldrick  
David Gibson  
Elizabeth Cabraser  
Nolan Nicely, Jr.  
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Patrick Montoya  
Stephanie Arndt  
Yvonne Flaherty  
Douglas Mulvaney  
Rebecca Blair  
Terry Dawes  
Douglas Small  
Mitchell Toups  
William Riley  
Sharon Houston  
Daniel Clayton  
Nolan Nicely  
Bryan Bleichner  
David Rashid  
Ryan Osterholm

PROCEEDINGS

THE CLERK: Good afternoon. Court is now in session in the matter of in re: New England Compounding Pharmacy, Incorporated products liability litigation, MDL 13-MD-02419. Counsel for the plaintiffs, please note your appearance for the record.

MS. PARKER: Good afternoon, your Honor, Kristen Johnson Parker, liaison counsel for the plaintiffs, also counsel for plaintiffs Eric and Cole.

03:06PM MR. SOBOL: Good afternoon, your Honor, Tom Sobol for plaintiffs, Erkan and Cole.

MR. ELLIS: Fredric Ellis for various clients.

MS. DOUGHERTY: Good afternoon, your Honor, Kim Dougherty for plaintiffs, Green and Smith and other plaintiffs.

THE COURT: All right.

THE CLERK: Counsel for NECP, please note your appearance for the record.

03:07PM MR. FERN: Good afternoon, your Honor, Frederick Fern from Harris Beach on behalf of NECC.

MR. TRANEN: Daniel Tranen from Hinshaw & Culbertson for NECP.

THE CLERK: And for Ameridose.

MR. MORIARTY: Matthew Moriarty from Tucker & Ellis.

THE CLERK: And defense.

1 MR. RABINOVITZ: Dan Rabinovitz on behalf of MSM.  
2 Good afternoon, your Honor.

3 MR. GOTTFRIED: Your Honor, Michael Gottfried for  
4 Paul Moore of the chapter trustee.

5 MR. MOLTON: Your Honor, David Molton for the official  
6 creditors' committee of NECP.

7 MR. GALLIGAN: Your Honor, Mike Galligan from  
8 Tennessee, plaintiffs' counsel and on the creditors' committee.

9 MS. ANDREWS: Good afternoon, your Honor, Anne Andrews  
02:07PM 10 on behalf of plaintiff Goodman and for the creditors'  
11 committee.

12 MR. COREY: Good afternoon, your Honor, Michael Corey  
13 on behalf of the creditors' committee.

14 MR. CIPORKIN: Good afternoon, your Honor,  
15 Ryan Ciporkin on behalf of Alaunus Pharmaceutical.

16 MS. NADEL: Good afternoon, your Honor, Heidi Nadel  
17 from Todd & Weld. I represent Doug and Carla Conigliaro, and  
18 I'm interim liaison counsel for the individual defendants.

19 MS. PEIRCE: Your Honor, Michelle Peirce. I don't  
02:07PM 20 have a formal appearance in at this point. I'm anticipating.

21 MR. KAPLAN: Charles Kaplan, good afternoon, your  
22 Honor.

23 THE COURT: All right. I'm not going to have everyone  
24 on the phone, I think we have at least 30 lawyers on the phone,  
25 introduce themselves. We did have a sign-in sheet. I would

1 like to move as briskly as we could through this agenda. I  
2 apologize, I know it's hard to bring everyone together. In  
3 addition to presiding over a trial, I'm in the midst of a  
4 difficult sentencing. I have about 30 victims of a massive  
5 financial fraud who are here from Vermont, and I'm midstream in  
6 a sentencing, so I'd like to be completed by four so we can  
7 accomplish that.

8 I'm going to follow the agenda that was circulated  
9 beginning with an update on the proceedings in the bankruptcy  
03:09PM 10 court. I'm not sure who to start with, but I think it rather  
11 makes sense to start with the trustee, and then I'll hear from  
12 counsel for plaintiffs. Mr. Gottfried.

13 MR. GOTTFRIED: Thank you, your Honor. The status of  
14 the bankruptcy is that since Judge Boroff granted the  
15 attachments, the trustees have all filed answers which are now  
16 filed in the bankruptcy court. Mr. Moore has commenced a  
17 series of meetings with the various constituencies and is  
18 working towards trying to develop a consensus of a cost  
19 effective and fair way forward. He held several meetings today  
03:10PM 20 with respect to that goal. The answer dates have been extended  
21 through I believe it's March 25th.

22 THE COURT: Who wants to take the lead for the  
23 plaintiffs on this issue? Ms. Parker.

24 MS. PARKER: I'll do that, thank you. Since our last  
25 status conference, as Mr. Gottfried referenced, the proofs of

1 attachment have been filed in the adversary proceeding pending  
2 in the bankruptcy court. Other than that, there have been no  
3 significant developments in the bankruptcy court dockets. I  
4 will note that the trustee has arranged multiple meetings with  
5 the creditors' committee as well as other parties that are  
6 interested in order to hear from those parties and also to  
7 understand their input on how things may best move forward  
8 there. Thank you.

9 THE COURT: All right. Does anyone want to speak on  
03:10PM 10 behalf of the creditors' committee?

11 MS. ANDREWS: Yes, your Honor. This is Anne Andrews,  
12 and to my right, Mr. Coan. We're coshares of the creditors'  
13 committee, and our counsel representing the committee is  
14 David Molton who will update the Court.

15 MR. MOLTON: Your Honor, good afternoon, David Molton  
16 for the creditors' committee. I don't have much more to add  
17 other than the fact that the committee with the trustee are  
18 moving forward with discussions as to procedures, protocols,  
19 case management proposals that might expedite the process of  
03:11PM 20 getting towards a consensual resolution of matters.

21 Needless to say, that's going to involve the input of  
22 the plaintiff's committee as well as any defendants' liaison,  
23 and we're looking forward to progressing towards the creation  
24 of a permanent PSE and defendant's committee possibly in order  
25 to aid us with those discussions so that we can come back to

1 your Honor with some proposals.

2 THE COURT: All right. Does anyone else want to be  
3 heard on the status of bankruptcy proceedings? All right.  
4 Status of docket, I'm not sure. Ms. Parker, let me hear from  
5 you first.

6 MS. PARKER: Yes, your Honor, the MDL has so far  
7 issued three conditional transfer orders. Those address, I  
8 believe, about 150 cases. Those are all in various states of  
9 making their way to this Court, but that is the universe of  
03:12PM 10 cases in front of your Honor.

11 THE COURT: All right. Anything else on that topic?  
12 All right. Establishing a plaintiffs' leadership structure, I  
13 guess I've read the proposals. I don't think they're terribly  
14 different. I need to draw something of a balance here, as  
15 someone pointed out.

16 I think maybe the letter signed by Mr. Sobol, this is  
17 not the typical mass tort case in which there's likely to be a  
18 gigantic pot of money at the end of the day, or perhaps be more  
19 accurate, there's not likely to be money sufficient to all of  
03:13PM 20 the potential claims, but it has otherwise the features of a  
21 mass tort case. It has all the complications that such a case  
22 is likely to involve and maybe then some.

23 I have a proposal for a five-person plaintiffs'  
24 steering committee and a nine-person steering committee,  
25 otherwise they're substantially identical, I think. Both



1 propose a lead or liaison counsel, a federal, state liaison and  
2 various other members who have different constituencies or  
3 otherwise fairly represent some group of the plaintiffs, and I  
4 think both proposals suggest that whether we need subcommittees  
5 and further structure is an issue that can be decided down the  
6 road, and there's attention there, I guess, between having  
7 things streamlined, keeping costs down, trying to be efficient,  
8 the more people we add, the less efficient things get, and then  
9 some of the interests on the other side of the house including,  
03:14PM 10 I suppose, financing the litigation to the extent that it has  
11 to be financed and making sure that everyone who needs to has a  
12 seat at the table.

13 For want of a better plan, I'm going to steer a middle  
14 path, and I'm going to have a seven-person plaintiffs' steering  
15 committee. I do think it makes sense to have certainly at the  
16 beginning an early liaison counsel, but I think someone needs  
17 to be at least the first person I look to for a response and  
18 the first person that other attorneys can contact.

19 I think it makes sense, putting to one side, whether  
03:15PM 20 all of these cases wind up getting consolidated to have a state  
21 liaison or a liaison to the state litigation, and it's not  
22 clear to me otherwise how this ought to be structured. I want  
23 another round of proposals. We do have this odd situation in  
24 which there appear to be no or at least none that I'm aware of  
25 Massachusetts-based plaintiffs.

1           The litigation is concentrated in certain states, at  
2     least the last set of numbers I looked at, I think Michigan had  
3     the highest number of cases followed by Tennessee and Indiana,  
4     and I think Virginia, New Jersey, Florida, some other states  
5     had a more on the order of two or three or four dozen.

6           And obviously geographic representation is an issue  
7     but not the only issue, and I think it makes sense for a  
8     variety of reasons to have at least at the beginning stage of  
9     this to have a local Massachusetts lawyer to serve as liaison  
03:16PM 10    counsel subject to revision as we go forward.

11           So what I think I would like to do, and I want to hear  
12    from counsel as to where we go next, would be to entertain  
13    proposals as to how that would be staffed. I don't think we  
14    ought to wait terribly long on this issue. Perhaps we've  
15    already waited too long, but I think my vision here is to  
16    provide some period of time in which parties submit proposals.

17           I don't expect that everyone will agree, but to the  
18    extent that people can form coalitions, so to speak, I think it  
19    would be helpful and at least give me comfort that this process  
03:17PM 20    will be manageable.

21           So with that as a lead, Ms. Parker, let me hear your  
22    reaction to that. Again, the idea is a seven-person steering  
23    committee. Go ahead.

24           MS. PARKER: Thank you, your Honor. We would request  
25    that the Court give us seven days to make those submissions.

1 We agree that it should be done quickly. The plaintiffs will  
2 certainly speak and attempt to reach a consensus. In the event  
3 that that is not possible, we'll submit multiple proposals to  
4 your Honor.

5 THE COURT: I think Mr. Ellis, you signed the other  
6 principal letter. Do you want to be heard on this topic?

7 MR. ELLIS: Judge, that sounds fine, I think that  
8 seven days would be good.

9 THE COURT: Anyone else on the plaintiffs' side of the  
03:18PM 10 house want to address this issue? All right. Anyone else in  
11 the courtroom, either trustee, creditors' committee,  
12 defendants, anyone want to address this further? All right. I  
13 don't propose to do anything particularly radical, threatening.  
14 We do need a leadership structure in place, and we do need to  
15 move quickly.

16 What I'll direct then is that further proposals for  
17 specific membership or roles on the committee be submitted by  
18 close of business on Tuesday, March 19th, 2013. I won't put  
19 any page limit on it except I ask you to be merciful, so to  
03:18PM 20 speak, to the district judge.

21 I don't know whether I'll need anything further. I'll  
22 have to see what you propose, but to jump ahead of myself, I'd  
23 like to reconvene if we could in about three weeks or so.  
24 Obviously I'd try to make the decision quickly. I don't know  
25 that I need a formal beauty contest or anything of that nature,

1 but I'll just see what the proposals are. Next on the agenda  
2 are -- I'm sorry, yes, Mr. Sobol.

3 MR. SOBOL: It occurred to me, your Honor, when you  
4 were indicating the time frame that when folks make the  
5 proposal or proposals, it probably makes sense to have a  
6 proposed order which identifies the suggested powers of the PSE  
7 because if you enter an order choosing either one or whatever,  
8 people will then know what they're allowed to do or not do  
9 because there are some things that people actually want to move  
03:19PM 10 forward with.

11 THE COURT: I agree that makes sense. I should also  
12 emphasize while I'm putting this in place, I'm doing it  
13 somewhat blindly. I don't know how this is going to progress.  
14 I don't know what the lead issues are going to be. You know,  
15 it could be that Tennessee law winds up being the most  
16 important issue in this case. This is all subject to revision  
17 and refinement as we go forward. I need to put something in  
18 place here, and it needs to be in the form of a formal order  
19 that lays out lines of authority, you know, just so we can  
03:20PM 20 manage this process as well as we possibly can.

21 I don't know that I need to change anything on the  
22 defense side of the house. I guess Ms. Nadel, or Ms. Peirce,  
23 do you have a view as to the individuals whether we need  
24 anything different than what we have now?

25 MS. PURSE: I don't. I think Ms. Nadel --

1 THE COURT: Let me ask people to remain seated and  
2 speak into the mic. because we have so many people on the  
3 phone.

4 MR. NADEL: Your Honor, I don't think so. I think if  
5 individual counsel want to appear. They've been coming as  
6 well, and we've been coordinating closely. Unless they have a  
7 preference, I'm fine.

8 THE COURT: All right. I'll leave that in place. I  
9 may change the term "interim" to "liaison counsel." At some  
03:21PM 10 point you're not interim anymore, but we'll take that a step at  
11 a time as well.

12 All right. The fourth thing on the agenda is  
13 coordination with other courts. What is meant by that,  
14 Ms. Parker?

15 MS. PARKER: Your Honor, I believe your comments  
16 earlier indicating that you are likely to appoint a federal,  
17 state or state court liaison counsel will address that general  
18 topic.

19 THE COURT: All right. As I think you know, we have a  
03:21PM 20 motion from the trustee that I think would bring everything  
21 here, heaven help me, so there may be nothing to coordinate, I  
22 don't know. I don't know how this is going to play out. I  
23 have to coordinate with myself, I guess, but if this doesn't  
24 proceed down that path, and I express no opinion at this point,  
25 we will have, of course, not only Massachusetts state cases but

1 state cases in other jurisdictions, and certainly a large  
2 degree of coordination would be useful, not merely with the  
3 lawyers, but with the presiding judges as well which tees up  
4 the trustee's motion, and let me jump to my landing point on  
5 that, which is I've read it, and I'm speaking of the March 10th  
6 motion from the trustee to I guess transfer everything here as  
7 related under the related to jurisdiction rubric of Section I  
8 think it's 157(b)(5) of the bankruptcy code.

9 My immediate issue is I'd like to have this briefed,  
03:22PM 10 and it's not clear to me how I would have it briefed. Should I  
11 allow opposing parties to intervene for purposes of opposing  
12 it? Mr. Gottfried, what do you think makes sense here?

13 MR. GOTTFRIED: We wanted to discuss this with you.

14 THE COURT: This is your chance.

15 MR. GOTTFRIED: I think our thinking was once you  
16 established a briefing schedule, we would serve a notice of  
17 motion on all of the parties that are identified in our  
18 Exhibit A to the proposed order, which would allow them to  
19 access the papers on a website. Obviously we want to have  
03:23PM 20 mailing and copying costs be at a minimum to conserve the  
21 assets of the estate. There's some additional cases that we've  
22 become aware of even since we filed on Sunday.

23 We'll need to amend list so the Court has the full  
24 list as of today, but our thought would be you establish a  
25 briefing schedule, we would serve notice of motion on the

1 various parties, they'd have that briefing schedule, they'd be  
2 on notice if they objected to appear in front of you and file  
3 their position.

4 THE COURT: And presumably they'd be allowed to  
5 intervene. In other words, let's take a pain clinic in  
6 Roanoke, Virginia, for example. Presumably that party could  
7 intervene for the purposes of addressing that motion.

8 MR. GOTTFRIED: That would make sense for the trustee,  
9 your Honor.

03:24PM 10 THE COURT: I'm making this up here. What do you  
11 think is a reasonable briefing schedule given what's at stake  
12 here? Is 30 days too long? Are you thinking shorter? Longer?  
13 What's your general?

14 MR. GOTTFRIED: I don't have an issue with 30 days at  
15 all. I think it may make some sense to have your leadership  
16 structure for the plaintiffs group in place. Maybe there can  
17 be some benefits if that's the case, and we have people to talk  
18 to in addition to the creditors' committee who obviously we are  
19 talking to, so I'd be fine with 30 days, your Honor.

03:24PM 20 THE COURT: Who wants to be heard on the plaintiffs'  
21 side of the house here? Ms. Parker.

22 MS. PARKER: Thank you, your Honor.

23 THE COURT: I recognize this was filed I think on  
24 Sunday. I read it last night somewhat at high speed, so I'm  
25 not fully informed on the issues obviously. Ms. Parker.

1 MS. PARKER: We would agree that the plaintiffs'  
2 leadership structure should be imposed so that leadership  
3 structure can undertake a reasoned consideration of the motion.  
4 It raises a number of issues. We want to give it some serious  
5 thought. There's a question of notice. We appreciate that the  
6 trustee intends to provide notice to those actions that are  
7 listed on his schedules and may amend those schedules.

8 There's another issue, your Honor, which is there are  
9 some plaintiffs who have not yet filed but intend to file cases  
03:25PM 10 in state courts across the country. To the extent possible, we  
11 would hope that a PSE could reach out and attempt to provide  
12 notice to those parties as well.

13 THE COURT: There's also this issue of do I have  
14 related to jurisdiction over a state court claim that has not  
15 even been filed yet. Exactly how does this work mechanically  
16 even if I decide it's a good idea? It's just not clear to me  
17 how that's going to happen.

18 MS. PARKER: It's not clear to me either, your Honor,  
19 and that's one of the reasons that I think we're eager to have  
03:26PM 20 a plaintiffs' structure in place that can delve into that and  
21 think about those issues and reach some conclusions. We would  
22 also say that in terms of process, 30 days would be great if we  
23 have a plaintiffs' steering committee picked fairly quickly  
24 within that time period.

25 THE COURT: So thirty days meaning thirty days from



1 March 10th, I guess, takes us to April 9th. Is that the kind  
2 of time frame we're talking about, or is it 30 days from the  
3 time I have a plaintiffs' structure in place?

4 MS. PARKER: I think we'd ask for another week, your  
5 Honor. That's a little aggressive.

6 THE COURT: Why don't we do this, and I'd be prepared  
7 to move this deadline, just to have a working framework. I'm  
8 going to direct first that the bankruptcy trustee submit a  
9 proposed form of order on the issues of notice to effective  
03:26PM 10 parties and the briefing schedule. Mr. Gottfried, how quickly  
11 do you think you could get that on file?

12 MR. GOTTFRIED: By the end of the week, if that's okay  
13 with the Court.

14 THE COURT: All right. By March 15th, then I will set  
15 a deadline subject to modification of April 16th for briefs in  
16 opposition to or otherwise responsive to the trustee's motion  
17 to transfer, and I will attempt to be reasonable as this plays  
18 out to make sure that all the effective parties have an  
19 adequate opportunity to weigh in on the subject, but at least  
03:27PM 20 we'll have a deadline to work with.

21 MR. GOTTFRIED: Your Honor, one other issue. I don't  
22 want to jump ahead on the agenda, but it would be the trustee's  
23 view that the Ameridose motion and the GDC motion probably  
24 should be heard with the trustee's motion, and a consolidated  
25 briefing schedule makes some sense.

1 THE COURT: I think that's right. I think they are  
2 intertwined inexplicably. Counsel for Ameridose and GDC, do  
3 you want to be heard on that? Mr. Moriarty.

4 MR. MORIARTY: The only thing I would add, your Honor,  
5 is that the brief in opposition to remand, which is item 5E on  
6 the agenda, we've already opposed it. I think we filed it  
7 today in the individual cases to which those applied.

8 Section 157 is discussed in our opposition to remand  
9 in addition to the original reasons for the removal in  
03:28PM 10 New Jersey of fraudulent joinder, so I don't know if the  
11 trustee wants to bind that one in together because there are  
12 two independent reasons for those motions to remand to be  
13 denied.

14 THE COURT: Well, I suppose, again, they're all  
15 intertwined. I mean, I think I've already remanded a couple of  
16 your cases, Mr. Ellis, earlier on back when I only had 12  
17 cases. Those long ago days of yesteryear, but, again, all of  
18 that would be mooted. If I did this, I assume, then the remand  
19 isn't an issue; if I don't do it, then, you know, if I don't  
03:29PM 20 have subject matter jurisdiction, it's got to go back to state  
21 court, so I suppose that all of the issues are intertwined and  
22 ought to be taken up at the same time.

23 A motion to remand, for example, on lack of diversity  
24 or fraudulent joinder it seems to me probably can be put on  
25 hold while we sort out the 157 issues, and if I decide not to

1 bring everything here, then we could take those issues up.

2 MR. GOTTFRIED: Your Honor -- sorry.

3 MS. PARKER: So --

4 THE COURT: Go ahead.

5 MR. GOTTFRIED: On behalf of GDC --

6 THE COURT: Yes.

7 MR. GOTTFRIED: -- and I just in response to the  
8 Court's question agree that our motion can be handled in  
9 conjunction with the trustees.

03:30PM 10 THE COURT: Okay. Thank you. I'm sorry, who started  
11 to speak, Ms. Parker?

12 MS. PARKER: Thank you. I had a point of  
13 clarification, your Honor.

14 THE COURT: Yes.

15 MS. PARKER: I have spoken with counsel for plaintiffs  
16 who have cases pending in state courts elsewhere. They have  
17 asked whether your Honor will permit them to be heard in  
18 response to the trustee's motion and has specifically asked the  
19 procedural question of whether or not they would need to retain  
03:30PM 20 local counsel in order to do so given that they are not a party  
21 to a proceeding currently before this Court.

22 THE COURT: I would hope not, but I'm shooting from  
23 the hip here. I've never had this situation.

24 MR. SOBOL: If I may --

25 THE COURT: Mr. Sobol.

1 MR. SOBOL: -- you could enter an order that would  
2 permit a lawyer in good standing in a state jurisdiction for  
3 the purposes of the case.

4 THE COURT: To appear for the purpose of addressing  
5 this particular issue?

6 MR. SOBOL: Right, yes, have a standing order to that  
7 effect.

8 THE COURT: All right. I think that makes sense. Let  
9 me put on I guess you're still interim liaison counsel,  
03:31PM 10 Ms. Parker. Why don't you submit a proposed draft of such an  
11 order also by Friday of this week so that I have that in place  
12 as well, I may or may not enter it, but so that is on the  
13 agenda as well.

14 MS. PARKER: Yes, your Honor, thank you.

15 THE COURT: I'm sorry, counsel.

16 MS. DOUGHERTY: Yes.

17 THE COURT: You're Ms. Dougherty; is that right?

18 MS. DOUGHERTY: Ms. Dougherty, thank you. Working  
19 with some of the folks who are involved in cases brought in the  
03:31PM 20 other states involving clinics and hospitals, one of the things  
21 that they do have concern about is that the hospitals and  
22 clinics themselves also receive notice and that it's not just  
23 plaintiffs' counsel getting notice but allowing the defendants  
24 that are hospitals and clinics that remain in those cases the  
25 opportunity to also weigh in on whether or not the case should

1 be transferred so in fact the notice can also be provided to  
2 those hospitals and clinics.

3 THE COURT: Are they represented by counsel? I'm not  
4 following, in other words, if they're represented by counsel,  
5 isn't counsel obligated to work through counsel, not contact  
6 the client directly?

7 MS. DOUGHERTY: Yes. There are also notice of claims  
8 that have been made that in fact certain cases where they may  
9 not have counsel yet. Perhaps Mr. Galligan can answer that  
03:32PM 10 question more specifically, but the notice itself, we just  
11 wanted to make sure is not just plaintiffs' lawyers but also to  
12 the defense lawyers.

13 THE COURT: Of course, it would be to any affected  
14 party. I didn't mean to -- if I said plaintiffs, I misspoke,  
15 it would be any affected party as well.

16 MS. DOUGHERTY: Mr. Galligan can answer your question,  
17 I presume, on whether or not the cases involving notices of  
18 claims actually have a lawyer representing them for the  
19 defendant. I'm not sure of that.

03:32PM 20 THE COURT: Well, I guess as a general proposition  
21 that notice to an effective party ought to go to the attorney  
22 if there's an attorney of record. If there isn't an attorney  
23 of record, I suppose a notice of claim in the bankrupt  
24 proceeding that was not done with the lawyer, then I guess it  
25 goes to the party filing the notice of claim.

1 I can't imagine we're going to do this without some  
2 imperfections in the process, but the notice ought to be  
3 reasonably designed to reach all the affected parties and  
4 Mr. Gottfried should at least give some thought about how we  
5 would go about doing that.

6 MR. GALLIGAN: I'm Mr. Galligan from Tennessee that  
7 was referred to.

8 THE COURT: Yes.

9 MR. GALLIGAN: I can't say that I know about every  
03:33PM 10 potential defendant, I'm a plaintiffs' lawyer here, but in  
11 Tennessee, where I'm from, virtually all of the potential  
12 defendants have attorneys and have them for this case and have  
13 had them from the very beginning.

14 THE COURT: I mean, again, if the wrinkle is --

15 MR. GALLIGAN: If somebody needs -- if you need who  
16 they are, I can provide that for them.

17 THE COURT: Okay. The wrinkle, of course, is we've  
18 got litigation in, you know, a couple dozen states. People may  
19 have joined some local, you know, sales distributor, I just  
03:34PM 20 don't even know what these cases look like or why they're not  
21 diverse, for that matter. I guess by definition, there's  
22 someone local involved, so we'll handle it as best we can.

23 MS. ANDREWS: Your Honor --

24 THE COURT: Yes.

25 MS. ANDREWS: -- this is Anne Andrews. The creditor's

1 committee will be having national meetings, we will, obviously,  
2 the committee will be deliberating this and taking the position  
3 formally, but in our leadership structure in Tennessee and all  
4 across the country and in our national trial association, we  
5 have a very good handle on who the counsel are that will be  
6 affected by this motion, and what we would propose within our  
7 committee structure is to take that opportunity to use the  
8 website that's currently in progress, that we can post it on  
9 the official website for the creditors' committee and in places  
03:34PM 10 where we can direct many interested parties to this notice,  
11 though it's not formal, it should be helpful.

12 THE COURT: Thank you. I appreciate that. Having  
13 said that, we do need to turn a square corner, and these things  
14 have to be my Court Order, you know, to make the form of notice  
15 official. I can't rely just on good intentions. Yes.

16 MR. THOMAS: Can I just make a brief comment?

17 THE COURT: Yes, and identify yourself for the people  
18 on the phone.

19 MR. THOMAS: Joe Thomas for GDC.

03:35PM 20 THE COURT: Yes.

21 MR. THOMAS: Very briefly, with regard to the issue  
22 about individuals who are claimants. I was in the position in  
23 the Twin Labs litigation of being the person who moved in this  
24 instance for the 157(b)(5) transfers, and all we did with  
25 regard to claimants is we waited until a subsequent time when

1     there were additional lawsuits, and we simply filed a  
2     supplemental motion, and eventually all of counsel in the  
3     litigation were counsel to those parties, and we were able to  
4     do that very expeditiously in the future so that for the  
5     initial moving parties, we could simply do it without regard to  
6     the claimants because they would have their opportunity to be  
7     heard when the supplemental motions are filed at a later date,  
8     with regard to the transfer hearing in the individual cases,  
9     and it happens pretty quickly and becomes fairly automatic  
03:36PM 10    after a period of time.

11           THE COURT: I think that was their complaint, it  
12     becomes automatic after awhile, and the time to oppose it is  
13     now. Whatever I do, I'm not going to revisit this endlessly.

14           MR. MOLTON: Your Honor, David Molton for the  
15     creditors' committee.

16           THE COURT: Yes.

17           MR. MOLTON: I just wanted to join Mr. Thomas, we were  
18     both in Twin together, and what happened there was there was an  
19     initial transfer motion, and there's other people in this room  
03:36PM 20    also who were involved in the federal bankruptcies where this  
21     was utilized, and there were supplemental motions as cases were  
22     filed, so that issue becomes dealt with by his supplemental  
23     notice or motion practice when new cases are filed, so the  
24     issue of unfiled cases really isn't one that I don't think is  
25     dealt with by or need to be addressed in this plan, the first



1 motion.

2 MR. THOMAS: And I wasn't suggesting that you don't  
3 have an opportunity to be heard, I mean, the same process  
4 occurs, it's just simply there are less and less of them as  
5 time goes on here.

6 THE COURT: Okay. All right. Item Number 6, master  
7 complaint. Certainly I think it's desirable at some stage of  
8 the proceeding to have master complaints in other centralized  
9 pleadings. Ms. Parker, do you have a specific proposal or is  
03:37PM 10 this --

11 MS. PARKER: No, your Honor, I would say that item 6,  
12 7 and 8 reference things that may need to be done in the  
13 relatively near short term, although some of them will be  
14 significantly impacted by both the trustee's motion but also a  
15 discussion of whether or not discovery will move forward or be  
16 stayed. We did just sort of want to flag those for the Court's  
17 attention.

18 THE COURT: Okay. I agree. Some of these may occur  
19 faster than others, but I think they're all things that I may  
03:37PM 20 need to pay attention to up front and segueing into a point 9.  
21 I guess one of the things I've been saying all along, and I'll  
22 continue to say it is there are certain things that no matter  
23 what proceeding we're in, whether it's, you know, a jury trial,  
24 bankruptcy court, some kind of fund with the special master,  
25 we're going to need medical records, product I.D. records to be

1 collected and to have all the releases and so forth, and I  
2 don't have any discovery orders in place I don't think, and I  
3 think we're a ways from being there, but I do expect that  
4 people will get their ducks in line, so to speak, because I  
5 always have concerns that some of this evidence becomes harder  
6 to find the longer we wait, and it's clearly going to be  
7 relevant no matter how these claims are resolved.

8 All right. Anything on 6, 7, 8, do any of the  
9 defendants want to be heard on any of those issues at this  
03:39PM 10 point? Mr. Fern.

11 MR. FERN: Judge, the only item after 6, 7 and 8, I  
12 agree that at some point we will get to a master complaint with  
13 a master answer and the like. That should probably await until  
14 a plaintiffs' steering committee is in place, we can negotiate  
15 with a smaller group and do it more effectively.

16 THE COURT: Okay. Yes, sir.

17 MR. CIPORKIN: Good afternoon, your Honor, Ryan  
18 Ciporkin for Alaunus Pharmaceutical. I just wanted to join  
19 Mr. Fern in his comment in terms of waiting on the master  
03:39PM 20 complaint. As your Honor is aware, Alaunus has filed motions  
21 to dismiss in many of the cases, and depending on the result of  
22 that motion, Alaunus may or may not be a party to the master  
23 complaint.

24 THE COURT: I certainly understand that. You know,  
25 I'm judging nothing here before its time, but it's my

1 experience that there tend to be peripheral defendants in these  
2 types of cases, some of whom are eliminated in 12(b)(6) and  
3 others on summary judgment, and certainly it's expensive to  
4 keep a party in who ought not to be in, but I don't know that  
5 I'm prepared to address those issues just yet either.

6 The status of the various Alaunus motions to dismiss,  
7 I know you filed some of them, I think have we just extended  
8 the time for response, or remind me where those stand. I have  
9 a stack of them.

03:40PM 10 MR. CIPORKIN: Your Honor, there was actually I  
11 believe that Alaunus has been named in 30 something lawsuits so  
12 far, and Alaunus has filed motions to dismiss in each of the  
13 one 15 Indiana cases. Those were all filed before the transfer  
14 to Massachusetts as well as the 15 cases in New Jersey.  
15 Alaunus filed a consolidated motion to dismiss for all 15 of  
16 those cases before the transfer. Your Honor just allowed a  
17 reply brief on the New Jersey motion to dismiss, which I filed  
18 in all the individual cases this afternoon.

19 There's I think three cases in Massachusetts that have  
03:41PM 20 named Alaunus and Alaunus has also filed motions to dismiss  
21 there. There's one case coming from Maryland where a motion to  
22 dismiss will be filed and a few that are coming over from  
23 Virginia where motions may be filed in that, but all of them  
24 have been filed except for maybe three or four.

25 THE COURT: All right. Again, this is something that

1 it may be that the filing of a master complaint may supersede  
2 all of this. A master complaint is in the nature of an amended  
3 complaint.

4 I'm not prepared to address this issue just yet,  
5 although I do think it ought to be toward the top of the  
6 agenda. Again, it's something I ought to take up relatively  
7 quickly, and I don't want anyone to be prejudiced certainly in  
8 the short term, and if people want reasonable extensions of  
9 time to respond, I'd be prepared to give them.

03:42PM 10 MS. PARKER: Your Honor, if I may, I believe at the  
11 last status conference, you indefinitely extended the time to  
12 respond by Alaunus.

13 THE COURT: All right. If I didn't do it before, I'm  
14 doing it now. "Indefinite" is a word I don't like to use on  
15 things like that, but until the next status conference, and we  
16 can renew it each conference until I say otherwise.

17 MR. CIPORKIN: Okay. So the deadlines to respond to  
18 all the motions to dismiss are extended until the next --

19 THE COURT: Until at least the next status conference,  
03:42PM 20 and remind if I need to keep rolling them over. If we have a  
21 master claim that names Alaunus, we go down one path; if you're  
22 not in the master complaint -- it needs to be addressed up  
23 front. I'm not sure at this point that it's a sensible  
24 expenditure of my time to work my way through each one of  
25 these, a Maryland complaint, an Indiana complaint, a New Jersey

1 complaint and so forth in the short term. I just want to see  
2 how this develops a little bit, then we'll take up the issue.

3 MR. CIPORKIN: I did have a few more comments about  
4 the master complaint. If your Honor wanted to hear them now, I  
5 can address them.

6 THE COURT: Why don't you hum me a few bars.

7 MR. CIPORKIN: Well, your Honor, I've looked into the  
8 issue with the master complaint, and the majority of courts  
9 permit motion practice directed to the master complaint. There  
03:43PM 10 are a minority of jurisdictions out there who have taken the  
11 position that a master complaint is merely an administrative  
12 tool and that the plaintiffs individually don't adopt the  
13 master complaint as their personal complaint and so courts in  
14 those minority of jurisdictions have denied motions to dismiss  
15 that are directed at the master complaint, and so I just wanted  
16 to point that issue out to the Court that if your Honor intends  
17 to have a master complaint in place that it would be sensible  
18 to allow the plaintiffs and the defendants some feedback on  
19 that issue because my position at least would be that the  
03:44PM 20 plaintiffs should consent to having the master complaint as  
21 being their working -- their personal complaint and also that  
22 any master complaint that's filed is without prejudice to the  
23 defendants to engage in motion practice with regard to the  
24 master complaint.

25 THE COURT: All right. I'll confess then, I haven't

1 thought through the issues very carefully. I guess I'm more  
2 familiar with what you call the majority rule, but one way or  
3 another, I'll, you know, I'm going to give -- I want to  
4 administer this case sensibly in the short term, long term as  
5 well, and also give Alaunis a fair opportunity to get out of  
6 the litigation whether by 12(b)(6), Rule 56 or if it's not  
7 appropriate to keep them in, and I'd like to have some  
8 administratively workable way of doing that that's fair to both  
9 sides to tee up the issues, and it's not the first thing on my  
03:45PM 10 agenda, it's not the last thing, by any means, but right now I  
11 think we need to get some other things in place before I can  
12 take it up.

13 MR. CIPORKIN: Thank you, your Honor.

14 THE COURT: All right. Anything else that we ought to  
15 talk about while we have you here other than the date of the  
16 next status conference? Ms. Parker. Mr. Ellis.

17 MR. ELLIS: A quick question, can we go back to the  
18 motions to withdraw the reference?

19 THE COURT: Yes.

03:45PM 20 MR. ELLIS: Those motions were filed in my cases.

21 THE COURT: Yes.

22 MR. ELLIS: And as you noted, they got interdrawn into  
23 this motion to transfer all the cases basically.

24 THE COURT: Yes.

25 MR. ELLIS: So the motions are basically morphed from

1 a motion to withdraw the reference into basically a 157(b).

2 THE COURT: I don't think if it's morphed, but they  
3 interact with one another.

4 MR. ELLIS: Can we do just one response on April 16th  
5 to those motions, too?

6 THE COURT: I don't see any reason why not. Does  
7 Ameridose or GDC have a different view? We can, I suppose.  
8 Mr. Moriarty.

9 MR. MORIARTY: Well, it's already been fully briefed,  
03:46PM 10 but I have no objection if Mr. Ellis sees some issue come up in  
11 the trustee's subsequent work or some of the individual lawyers  
12 who may file briefs that if he needs leave to file something,  
13 we can work that out.

14 THE COURT: Okay.

15 MR. MORIARTY: I would assume it would go the other  
16 way.

17 THE COURT: Mr., I'm sorry, it's Thomas?

18 MR. THOMAS: No objection.

19 MR. ELLIS: Thank you.

03:46PM 20 THE COURT: Anything from the defendants further that  
21 you want to take up? Okay. How about -- Mr. Thomas.

22 MR. THOMAS: Just a point of clarity on the issue of  
23 answers. Are answers stayed for all parties?

24 THE COURT: Is there any reason not to stay all  
25 answers or responsive like Rule 12 pleadings at this stage of

1 the game? Does anyone see a reason to do things differently?  
2 I'm not hearing any response. Why don't we say that, again,  
3 until the next status conference because I don't want to do  
4 anything permanent here for fear of creating some unforeseen  
5 consequence. It will be the year 2022, and someone will say do  
6 you remember back, you know, you stayed this indefinitely, so  
7 let's say that answers and other responsive pleadings in  
8 response to a complaint are stayed until the next status  
9 conference with the expectation that I'll keep renewing that  
03:48PM 10 until we're ready to face the issue head on.

11 MR. THOMAS: Thank you.

12 THE COURT: All right. "In the year 2025, if man is  
13 still alive, we'll get to the end of this." The older people  
14 are chuckling; the younger people don't know what I'm talking  
15 about.

16 MR. MORIARTY: You're scaring us, Judge.

17 THE COURT: Mr. Gottfried, anything from the  
18 Chapter 11 trustee?

19 MR. GOTTFRIED: No, I just want to confirm consistent  
03:48PM 20 with your prior order that discovery is also stayed until the  
21 next status conference?

22 MR. MOLTON: Yes.

23 MR. GOTTFRIED: Thank you.

24 MR. MOLTON: Judge, David Molton for the creditors'  
25 committee.



1 THE COURT: Yes.

2 MR. MOLTON: One of the things that we're discussing  
3 with the trustee as well as in the committee and starting some  
4 discussions with some of the defendants about, and hopefully  
5 that will gain momentum, is coming up with a case management  
6 order that will deal with a lot of these issues, and very  
7 similar to one that was appended to the transfer motion, the  
8 Twin case management order dealing with the uninsured cases  
9 that deals with some other things, too, but that answers some  
03:49PM 10 of the questions on how to deal with this while giving the  
11 parties an opportunity if they can to seek to come to terms  
12 with your Honor's guidance and direction to a possibly global  
13 resolution for the benefit of the victims and the creditors,  
14 and that's something that will be happening over the next  
15 month, and we will be able to report to you more next month on  
16 it.

17 THE COURT: All right. Let me say I welcome proposals  
18 for case management orders on issues large and small. One of  
19 my fears with so many moving parts here is that I'm simply not  
03:49PM 20 going to address something that's going to create confusion and  
21 expense, if not something worse, so if parties have any  
22 reasonable proposals on further case management orders of any  
23 kind, I'm happy to entertain them.

24 Obviously to the extent that they're agreed upon or  
25 joint or negotiated, so much the better, but it doesn't have to

1 be the global resolution at this point. It can be something  
2 as, you know, minor as what, you know, the caption ought to  
3 look like or anything like that. I'm happy to entertain that.

4 All right. Anyone else in the courtroom wish to be  
5 heard? All right. I'm reluctant to open it up to anyone on  
6 the phone for fear that we'll talk over each other and won't be  
7 able to hear you. Is there anyone on the phone that feels they  
8 need to say something? Speak now or hold your peace. All  
9 right. I hear nothing.

03:50PM 10 All right. Peter, let me look at the calendar. The  
11 first clearly obvious time that I have for the next status  
12 conference is Thursday, April 11th at 2:30. That's longer  
13 than -- I wanted to make this about three weeks. Is that too  
14 far out? I'm in Washington the week of March 25th, and I'm  
15 booked pretty solid the week of April 1st. I do have a jury  
16 trial that --

17 MS. ANDREWS: Your Honor, earlier in the week, is that  
18 possible? There's a national meeting where many of the  
19 plaintiffs' counsel and the creditors' committee will be  
03:52PM 20 meeting on the 11th through the 14th. Is the 10th available by  
21 any chance?

22 MR. MORIARTY: While you're pondering that, your  
23 Honor, I know you're not going to be able to accommodate every  
24 lawyer, but I have a vacation that I cannot change that week.

25 THE COURT: I'm not going to be able to accommodate

1 every lawyer. As some of you know, I am perfectly content to  
2 have junior people, if that's the right word, cover hearings.  
3 I won't be upset if the senior lawyer isn't present. Of  
4 course, whoever covering needs to be up to speed, but why don't  
5 we do this. I can do it on -- I have a revocation here. Why  
6 don't we try to move that, assuming I can move this revocation  
7 hearing to the next day, why don't we say we will meet at 2:00.  
8 I'm going to be on trial possibly to one, and I've got another  
9 commitment at 3:30, so between 2:00 and 3:30 on April 10th.

03:53PM 10 MS. ANDREWS: Sounds good, your Honor, thank you.

11 THE COURT: For further status. And, again, hopefully  
12 some of these strands will begin to sort themselves out between  
13 now and then. Thank you for helping me work through this  
14 agenda. Anything further? Thank you, all, and I'll see you in  
15 about four weeks or so.

16 MS. PARKER: Thank you, your Honor.

17 (Whereupon, the hearing was adjourned at 3:53 p.m.)  
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25

## C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I do hereby certify that the foregoing transcript,  
Pages 1 through 36 inclusive, was recorded by me  
stenographically at the time and place aforesaid in Civil  
Action Nos. 12-12052-FDS and No. 12-12066-FDS, ERKAN, COLE, et  
al. vs. NEW ENGLAND COMPOUNDING.  
PHARMACY, INC., d/b/a NEW ENGLAND COMPOUNDING CENTER, et al.  
and thereafter by me reduced to typewriting and is a true and  
accurate record of the proceedings.

Dated this March 14, 2013.

s/s Valerie A. O'Hara

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VALERIE A. O'HARA

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